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Supreme Court, U.S.
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No. 96-132

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

ALEX WAYNE BOLT, NABESNA MINING PARTNERS, and WHITE MOUNTAIN MINING PARTNERS,

Petitioners,

vs.

PTARMIGAN COMPANY, INC.

Respondent.

Petition For Writ Of Certiorari To The Supreme Court of the State of Alaska

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

ALEX WAYNE BOLT
1317 W. Northern Lights
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September 3, 1996

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Petition For Writ Of Certiorari To The Supreme Court of the State of Alaska

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Petitioners are seeking review on the Alaska Supreme Court's affirmation of the trail court's judgments relative to two central and primary issues: (1) Was the relief from stay order dated May 19, 1994 (Respondent's Reply Brief, App. 6) statutorily defective and thus void, causing the courts below to lack jurisdiction (see Reply App. A1-A7), and (2) was the preclusion order dated March 31, 1992 (which established

fraud against petitioners and led to later resultant litigation ending default judgment) punitive beyond any degree of reasonableness which should have required clear and convincing evidence, none of which was ever introduced or produced to the trial court by respondents?

Respondents filed a two page Brief in Opposition and relied solely on its belief that the issue of a statutorily defective relief from stay was not properly an issue before this Court on appeal of the state supreme court decision. Respondent's Brief in Opposition did not oppose, in any way, petitioners' clear and convincing evidence arguments on the defective establishment of fraud preclusion order, and default litigation ending sanction judgment. Petitioners strongly disagree with respondent's opposition pertinent to the relief from stay order and file this reply containing facts and arguments below. Further, petitioners reply to the clear and convincing evidence standard and the limiting power of the court to impose punitive litigation ending sanctions without first requiring clear and convincing evidence. This Court should use its inherent powers to dispose of petitioners' Petition by summary disposition on the pleadings. Alternatively, certiorari should be granted.

To the extent this Court agrees with respondent that the relief from stay order may not be properly before this Court as filed, petitioners request the Court to invoke its powers under 28 U.S.C. § 1651(a), Extraordinary Writ, and decide the issue of whether a relief from stay order entered without notice and hearing as required under 11 U.S.C. § 362(d), when no emergency situation exists, is statutorily defective and thus void. This Court is requested to make such summary disposition now which will save time, costs, and judicial

resources that would be required when petitioners would file, under a separate petition for certiorari to the U.S. Bankruptcy Court on this same issue, once petitioner's chapter 11 proceedings are concluded in the U.S. Bankruptcy Court and a judgment is entered. Review and decisions by this Court now on the issues at bar would save tremendous time and resources from revisits of petitioners to the courts under orders and judgments affected by the central and primary questions at bar. A writ under 28 U.S.C. § 1651 would aid this Court's appellate jurisdiction and greatly clarify the question.

REPLY ARGUMENT I

Respondent's opposition brief remained silent and did not address the issue of clear and convincing evidence standards and due process issues raised in petitioners' Petition in questions presented (5, 6, 7, and 8) and Arguments III and IV. Respondents' reply brief only stated 'the Petition for Writ of Certiorari (the "Petition") is filled with misstatements and false accusations regarding both the substance and the procedural history of the case." Respondents did not point out any specific example of such assertions, because there are none.

No opposition by respondents to petitioner's Petition for Writ of Certiorari on specific issues justifies summary disposition of the petition on all points unopposed, and on questions opposed by respondent's legally unsupported opposition.

Petitioner timely filed his Petition for Writ of Certiorari based on harsh and unfair actions and decisions of the trial court and affirmation by the Alaska Supreme Court in its November 27, 1995, opinion. See App. A7 to Petition. Respondent filed no opposition to petitioners' questions 5

through 8 and petitioners' Arguments III and IV. Rule 15.2 of the Rules of the Supreme Court of the United States requires any brief in opposition to:

> ...address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

No brief in opposition to questions presented and arguments by petitioners clearly suggests respondent is in total agreement with petitioner's Petition, and that respondent has waived all rights to argue these points on appeal, and that a summary disposition can expeditiously be granted by this Court on all questions and arguments made by petitioners which remain without opposition. Jurisdiction by this Court to hear the case on the merits should be forthrightly granted and briefs on the merits should be called for and scheduled, absent a summary disposition in favor of petitioner.

REPLY ARGUMENT II

Petitioners' second primary issue relative to the clear and convincing standards has been clearly decided by this Court previously. Using its previous decisions, as presented in the

arguments below, this Court must reverse, vacate, and remand to the lower courts for a jury trial of the case on its merits, provided a statutorily effective relief from stay is obtained.

The trial court erred and the Alaska Supreme Court's affirmation must be reversed and remanded. The Alaska Supreme Court, in affirming the trial court's March 31, 1992, preclusion order, which established fraud against petitioners due to allegations by respondent's counsel, was in direct conflict with a series of Alaska cases which established legal precedent that trials on the merits must be allowed rather than default judgments in alleged discovery disputes. Petitioners' alleged misconduct could never approach the documented misconduct of litigants whose defaults have been reversed by the Alaska Supreme Court. In a wide range of cases, the Alaska Supreme Court (before this case at bar) held a consistent philosophy that trials on the merits were the rule — not the exception — and that establishment-preclusion orders and default litigation ending sanctions were not to be allowed, because of the "devastating," "drastic," and "extreme" consequences. See Underwriters at Lloyds London v. Narrows, 846 P.2d 118 (Alaska 1993), Sandstrom & Sons v. State of Alaska, 843 P.2d 645 (Alaska 1992), Otis Elevator Co. v. Garber, 820 P.2d 1072, 1074 (Alaska 1991), Ketchikan Cold Storage Co. v. State, 491 P.2d 143, 147 (Alaska 1971), and Hawes Firearms Co. v. Edwards, 634 P.2d 377, 378 (Alaska 1981). Further, judicial restraint in imposing sanctions under Rule 37(b) had been firmly settled by legal precedent and actions of this Court. Wilson v. Volkswagen of America, Inc., 561 F.2d 494, 503-504 (4th Cir. 1977), cert. denied, 434 U.S. 1020, 98 S.Ct. 744 (1978). Such inconsistent treatment as

rendered against petitioners is unfair, unjust, and denies petitioners equal access and equal protection in the courts. The inconsistent opinions and judicial activism by the Alaska trial courts and the Alaska Supreme Court should be reviewed by granting petitioners' Petition for Certiorari.

Petitioners attempted to comply with the law and fully sought, in both the trial court and the Alaska Supreme Court, to obtain equal protection and equal access, by filing motions to stay subject to petitioner's bankruptcy proceedings and for lack of jurisdiction for other legally supportable and substantive reasons. See Reply App. A1-A13.

The trial court used its inherent power to punish alleged litigation misconduct with the ultimate sanction of default against petitioners. It concluded that petitioners and their attorneys had engaged in litigation misconduct by, among other things, violating a discovery order which was universal in nature and required non-parties to produce up to 60,000 pages of non-relevant documents and tax returns which had no relevance whatsoever to the issues of quiet title before the court.

This Court has previously decided that, because of the fundamental importance of trying cases on their merits, and because other sanctions can both deter and correct alleged litigation misconduct when proven by only a preponderance of evidence, the social disutility of granting a trial on the merits to a party guilty of litigation misconduct is less than the social disutility of denying a trial to a party innocent of such misconduct. In a case addressing almost the precise issue faced here, the First Circuit concluded that for a district court to use its inherent power to dismiss a case based on a fraud on the

court, the fraud must be proven "clearly and convincingly." Aoude v. Mobil Oil Corp., 892 F.2d 1115 (1989).

A heightened standard of proof is particularly appropriate because most inherent power sanctions, including default judgments, are fundamentally punitive. Our judicial system has a cherished tradition of using a heightened standard of proof to guard against the erroneous imposition of criminal punishments and analogous deprivations of liberty, property, or reputation. Even in the case of punitive damages, which a mere preponderance of the evidence can sustain, the U.S. Supreme Court has observed that "[t]here is much to be said in favor of a State's requiring, as many do,...a standard of 'clear and convincing evidence' or, even, 'beyond a reasonable doubt'" to sustain a punitive damage awards. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 59 LW 4157 (1991).

This Court has also recognized that awards of attorneys' fees for bad faith conduct serve the same punitive and compensatory purposes as fines imposed for civil contempt. Chambers v. NASCO Inc., 501 U.S. 32, 59 LW 4595 (1991). As a result, courts require clear and convincing evidence of misconduct before imposing attorneys' fees under their inherent power. Because the inherent power sanctions of dismissal and default serve the same purposes as contempt — vindicating the district court's authority over a recalcitrant litigant — these sanctions should demand the same standard of proof: clear and convincing evidence. See Shepherd v. American Broadcasting Companies, Inc., CA DC, No. 94-7141 (8/25/95).

Finally, a heightened standard of proof is appropriate because the predicate misconduct at issue involves allegations of fraud or some other quasi-criminal wrongdoing by the

defendant. Proof of civil fraud in general requires clear and convincing evidence. It is also well settled that a litigant seeking relief from a judgment under Fed.R.Civ.P. 60(b)(3) based on allegations of fraud upon the court must prove the fraud by clear and convincing evidence. When a default judgment turns on whether the court finds that a fraud has in fact occurred, at stake is not just "any issue tried in a civil case," but rather an issue of an entirely different character, serving as it does both to punish misconduct and to defeat a party's very ability to try its case on the merits.

The Supreme Court has consistently declared that courts must use their inherent power with restraint and discretion. Preclusion orders and dismissal is a drastic step, normally to be taken only after unfruitful resort to lesser sanctions. Thus, on remand, in order to justify a default judgment, the court not only must find clear and convincing evidence of misconduct but also must provide a specific, reasoned explanation for rejecting lesser sanctions, such as fines, attorneys' fees, or adverse evidentiary rulings.

In similar situations courts have imposed similar requirements. Courts generally respond to document destruction or alteration with the ultimate sanction of dismissal or default in two types of cases: when the destroyed document is dispositive of the case, so that an issue-related sanction effectively disposes of the merits anyway, and when the guilty party has engaged in such wholesale destruction of primary evidence regarding a number of issues that the district court cannot fashion an effective issue-related sanction. Nothing in the record of this case demonstrates either circumstance. In fact, petitioners produced more than 20,000 pages of

documents and agreed to produce all sensitive documents for an in camera review by the court to determine the relevance, if any.

CONCLUSION

As a matter of public interest, law, and equity, this Court must grant petitioners' Petition for Writ of Certiorari and review these entire proceedings. Alternatively, this Court should invoke a review under 28 U.S.C. § 1651(a) and settle once and for all these issues which are in conflict between the state courts and federal circuits. This subject litigation has been ongoing for more than six years and will continue for many more years unless this Court grants review and finally adjudicates the issues before it in this case.

Justice requires this review. Public interest requires this review. Legal precedent has clearly been abolished in the case below and must be reinstated consistently between state courts and federal circuits. Equal access, equal protection, and due process are at great risk for a certain class of litigants if Certiorari is not granted in this case. Petitioners respectfully request this Court grant review by Certiorari or by Extraordinary Writ under 28 U.S.C. § 1651(a).

Respectfully submitted,

ALEX WAYNE BOLT
1317 W. Northern Lights, #100
Anchorage, Alaska 99503
(907) 258-6100
Petitioner

September 3, 1996

APPENDIX

THE SUPREME COURT OF THE STATE OF ALASKA

WAYNE BOLT,	)	
	)	
Appellant,	)	
vs.	)	
	)	
PTARMIGAN CO., INC.,	)	Superior Court Case
	)	3AN-90-9008 CI
Appellee.	)	Supreme Court Case S-5743
_____	)	

MOTION FOR STAY OF APPEAL

Appellant Wayne Bolt moves for a stay of his appeal until 30 days subsequent to dismissal or confirmation of his chapter 11 bankruptcy petition filed August 25, 1993, and pending in the U.S. Bankruptcy Court, Anchorage, District. Appellant Bolt is the sole General Partner of White Mountain Mining Partners and the Managing General Partner of Nabesna Mining Partners, and, as such, also moves this court for a stay of these related appeals. A stay of all three separate appeals until all three can be prosecuted concurrently would save significant judicial time and resources and the time and resources of all related parties.

The automatic stay in affect in Bolt's bankruptcy suspends any non-bankruptcy court's authority to continue judicial proceedings then pending against the debtor. This is so because § 362's stay is mandatory and "applicable to all

entities", including state and federal courts. 11 U.S.C. § 362(a). See Maritime Electric Co., Inc. v. United Jersey Bank, 959 F.2d 1194 (3rd Cir. 1991) and Boynton v. Ball, 121 U.S. 457, 466-67, 7 S.Ct. 981, 984, 30 L.Ed. 985 (1887) ("where the bankruptcy proceedings are brought to the attention of the court in which a suit is being prosecuted against a bankrupt, that court shall not proceed to final judgment until the question of his discharge shall have been determined."); In re Highway Truck Drivers & Helpers Local 107, 888 F.2d at 299 n. 8 (if state court proceeds in violation of stay, "such proceedings would have been in excess of the state court's authority and subject to collateral attack"); Ellis v. Consolidated Electric Corp., 711 F.2d 60, 61 (9th Cir. 1983) ("the automatic stay of proceeding is applicable at both the trial and appellate levels"), cert. denied, 478 U.S. 1021, 106 S.Ct. 3335, 92 L.Ed.2d 740 (1986); Kommanditselskab Supertrans v. O.C.C. Shipping, Inc., 79 B.R. 534, 540 (S.D.N.Y. 1987) (if stay applies, "the district court's power to adjudicate the case is suspended pending the outcome of the bankruptcy proceedings").

The automatic stay's effect on judicial proceedings against the debtor does not depend upon whether the court finds for or against the debtor. Ellis v. Consolidated Electric Corp., 894 F.2d 371, 373 (10th Cir. 1990). Once triggered, the automatic stay of an action pending against the debtor in district court "continues until the bankruptcy case is closed, dismissed, or discharge is granted or denied, or until the bankruptcy court grants some relief from the stay. 11 U.S.C. § 362(a), (c)(2), (d), (e), (f)." Pope v. Manville Forest Products Corp., 778 F.2d 238, 239 (5th Cir. 1985). See also

In re De Jesus Saez, 721 F.2d 848, 851-2 (1st Cir. 1983) (stay terminates when Chapter 13 petition is dismissed).

Absent relief from the stay, judicial actions and proceedings against the debtor are void ab initio. Kalb v. Feuerstein, 308 U.S. 433, 438-40, 60 S.Ct. 343, 346, 84 L.Ed. 370 ("the action of the ... Court was not merely erroneous but was beyond its power, void, and subject to collateral attack"). See also In re Ward, 837 F.2d 124, 126 (3rd Cir. 1988) (sheriff's sale conducted in violation of the stay is "void and without effect", citing Kalb).

Appellant Bolt moves for a stay of this appeal until his bankruptcy petition is dismissed or a plan is confirmed under Federal Bankruptcy Law.

Bolt requests a stay until 30 days after a disposition order by the Bankruptcy Court.

Dated this 4th day of April, 1994.

/s/ Wayne Bolt

Wayne Bolt

THE SUPREME COURT OF THE STATE OF ALASKA

Wayne Bolt, White Mountain Mining Partners, and Nabesna Mining Partners, Appellants,	)	
vs.	)	
	)	Superior Court Case
Ptarmigan Co., Inc., Appellee.	)	3AN-90-9008 CI
	)	Supreme Court Case
	)	S-5743, S-5744

MOTION FOR EXPEDITED CONSIDERATION

Defendant appellants filed a motion for remand to allow the court below to reconsider and determine jurisdiction and, alternatively, for this court to stay the appeal since appellee Ptarmigan's relief from stay is statutorily defective.

Oral argument has been set on this appeal for Wednesday, October 12, 1994. Defendants-appellants move for expedited consideration and for a decision on the motion for remand for lack of jurisdiction by 4 p.m. Tuesday, October 11, 1994, in time to prepare for presenting oral argument on October 12, 1994, if any.

This court has the obligation to inquire into jurisdiction whenever the possibility that jurisdiction does not exist arises. Philbrook v. Glodgett, 421 U.S. 707, 95 S.Ct. 1893, 44 L.Ed.2d 525 (1975); City of Kenosha, Wisconsin v. Bruno, 412 U.S. 507, 511, 93 S.Ct. 2222, 2225, 37 L.Ed.2d 109 (1973) (Courts of Appeals and the Supreme Court have a duty

to see to it that jurisdiction of the district court is not exceeded.)

The quitclaim deed which appellee Ptarmigan acquired from the trustee in the Colorado Resources, Inc. (CRI) chapter 7 case is statutorily defective in that the trustee had no right, title, or interest in the mining leases and related claims of CRI that the cancellations were "not effective or were voidable." See Exhibit A. The chapter 7 trustee did not initiate any action within the statutory 60 day period to acquire any such interest, making the trustee's deed void as a matter of law. See In re Elm Inn, Inc., 942 F.2d 630 (9th Cir. 1991) citing In re Damianopoulos, 93 B.R. 3, 6 (Bankr.N.D.N.Y. 1988) (granting surrender order and holding that when lease is deemed rejected under section 365(d)(4) it is "no longer property of the [bankrupt] estate"); In re O.P. Held, Inc., 77 B.R. 388, 391 (Bankr. N.D.N.Y. 1987) (granting surrender order); In re Hurst Lincoln-Mercury, Inc., 70 B.R. 815, 817 (Bankr. S.D. Ohio 1987) (same).

Thus, Ptarmigan acquired no right, title or interest from the trustee to initiate the action litigated below. All three counts contained in Ptarmigan's initial complaint were based entirely on alleged rights of action obtained out of the trustee's deed. Exhibit A. The trustee's deed is void as a matter of law. The lower court had no jurisdiction to hear Ptarmigan's alleged claims since Ptarmigan bought nothing from the trustee. Further, the validity of the mining leases are subject to a pending declaratory judgment complaint filed by appellants on the primary issue of force majeure. See motion for remand for copy of complaint.

Additionally, This court is without jurisdiction to continue this appellate proceeding because Ptarmigan has not obtained a statutorily valid relief from stay from the bankruptcy court. Debtor Wayne Bolt's due process rights were violated when Ptarmigan received a relief from stay without proper notice and a hearing as required by 11 U.S.C. § 362. The bankruptcy court's order which granted Ptarmigan relief is on appeal before the Bankruptcy Appellate Panel for the Ninth Circuit. Appeals from bankruptcy court determinations of stay litigation appear to be as a matter of right. See In re American Mariner Industries, Inc., 734 F.2d 426 (9th Cir. 1984); In re Regency Woods Apartments, Ltd., 686 F.2d 899 (11th Cir. 1982); In re Kemble, 776 F.2d 802 (9th Cir. 1985); In re Sun Valley Foods Co., 801 F.2d 186 (6th Cir. 1986); In re Sonnax Industries, Inc., 907 F.2d 1280 (2nd Cir. 1990).

The automatic stay applies to pending appeals. Ellison v. Northwest Engineering Company, 707 F.2d 1310 (11th Cir. 1983); Cathey v. Johns-Manville Sales Corp., 711 F.2d 60 (6th Cir. 1983), cert. denied 106 S.Ct. 3335 (1986); Commerzanstalt v. Telewide Systems, Inc., 790 F.2d 206 (2nd Cir. 1986); Ingersoll-Rand Financial Corp. v. Miller Mining Co., 817 F.2d 1424 (9th Cir. 1987) (appeal by debtor). This stay remains in effect the same as the Washington Appellate Court has decided in the Spokane litigation against appellants. See Exhibit B.

Actions taken against debtor's property in violation of the stay will be null and void. Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306 (11th Cir. 1982); Smith v. First America Bank, N.A., 876 F.2d 524 (6th Cir. 1989); In re Taylor, 884 F.2d 478 (9th Cir. 1989); Ellis v. Consolidated

Diesel Electric Corp., 894 F.2d 371 (10th Cir. 1990) (action taken in violation of stay is void even if stay is thereafter vacated.)

Appellants move for expedited consideration for a decision on these jurisdictional issues prior to hearing oral argument on October 12, 1994. A decision is requested by 4 p.m. Tuesday October 11, 1994. Appellants have hand carried today, October 10, 1994, a copy of this motion for expedited consideration to opposing counsel, i.e., Kirsten Tinglum, phone number 276-4331, and Jeffrey Mayhook, phone number 277-8888, as counsel for White Mountain Mining Partners.

Dated this 19th day of October, 1994.

/s/ Wayne Bolt
Wayne Bolt
/s/ Nabesna Mining Partners
Nabesna Mining Partners
/s/ by Wayne Bolt, Gen. Ptr.
By: Wayne Bolt,
Managing General Partner

THE SUPREME COURT OF THE STATE OF ALASKA

Wayne Bolt, White Mountain Mining Partners, and Nabesna Mining Partners,	)	
Appellants,	)	
vs.	)	
Ptarmigan Co., Inc.,	)	Superior Court Case 3AN-90-9008 CI
Appellee.	)	Supreme Court Case S-5743, S-5744

Memorandum In Support Of Appellants' Motion For Remand To Lower Court For Vacation Of Judgment For Lack Of Jurisdiction

Underlying Judgements Are Void For Lack Of Jurisdiction

This appeal arises from the lower court's judgments which are void for lack of jurisdiction. The initial underlying action was initiated by Ptarmigan Company, Inc. (Mr. Kirk Stanley) in October 1990, after Ptarmigan had allegedly acquired mining leases from debtor Colorado Resources, Inc. (CRI) who was in chapter 7 liquidation (case no. A89-00989-HAR). The sale of the mining leases, and the rights to bring this action, were sold to Ptarmigan Company, Inc. by the CRI chapter 7 trustee who had allegedly pulled into the CRI estate the subject mining leases as executory contracts under 11 U.S.C. § 365. This pull back was statutorily defective and therefore moot, as a matter of law under statutory construction

of 11 U.S.C. § 365 (d)(4). Appellants Wayne Bolt, Nabesna Mining Partners, and White Mountain Mining Partners opposed such void pull back (see Exhibit A), and demanded immediate surrender, but, nonetheless, the bankruptcy court entered a pull back order. As a matter of law and self-executing statutory construction, the pull back into the CRI estate and the trustee's deed (Exhibit B) are void. 11 U.S.C. § 365. The mining leases were not property of the CRI estate at the time the petition was filed. The trustee and his attorney made no effort to pull in the executory mining leases prior to the statutory 60 day limit under 11 U.S.C. § 365 (d)(4) making the eventual court order allowing pull back void. See In re Elm Inn, 942 F.2d 630 (9th Cir. 1991), citing In re Damianopoulos, 93 B.R. 3, 6 (Bankr. N.D.N.Y. 1988) (granting surrender order and holding that when a lease is deemed rejected under section 365 (d)(4) it is "no longer property of the bankrupt estate"); In re O.P. Held, Inc., 77 B.R. 388, 391 (Bankr. N.D.N.Y. 1987) (granting surrender order); In re Hurst Lincoln-Mercury, Inc., 70 B.R. 815, 817 (Bankr. S.D. Ohio 1987) (same).

Without a statutorily valid pull back order, the bankruptcy court had no jurisdiction to sell the leases and/or any related right of action to pursue this alleged controversy in the state court. Without jurisdiction by the lower court, this appeal is moot from the outset. Without jurisdiction, there is no valid lower court order or judgment on which to appeal to this court.

The CRI bankruptcy case was closed in February 1994. Appellants have filed amotion to reopen the case to allow motions to be filed to vacate the statutorily defective order of pull back into the CRI estate. See Exhibit C.

Additionally, appellants have filed a complaint (see Exhibit D) seeking a declaratory judgment that the mining leases between appellants and appellee Ptarmigan remains valid and that all payments are suspended by force majeure terms triggered in September 1989, as per the mining lease agreements. Ptarmigan has admitted it never responded to or reacted to appellants notice of force majeure since Ptarmigan had alleged to have acquired the mining leases back from the CRI trustee under the executory contract provisions and corresponding deed from the trustee. The lower court lacked jurisdiction to enter the judgments and orders now being considered on this appeal. Remand is proper. This court must enter a stay order pending resolution of the jurisdictional issues and the final adjudication of appellants now pending complaint for declaratory judgment over the force majeure issue and the continuing validity of the mining leases between appellants and appellee Ptarmigan.

No Effective Relief From Stay Has Been
Granted Ptarmigan To Continue Jurisdiction
Proceedings Against Appellants

On August 25, 1993, defendant appellant Wayne Bolt filed for chapter 11 bankruptcy protection. Appellant Ptarmigan continued this appellate action against appellant Bolt in willful violation of the automatic stay. Appellant Bolt objected and filed a motion to stay these proceedings. Upon review, this court temporarily stayed these proceedings pending relief from stay by appellee Ptarmigan. Ptarmigan then filed a motion for relief from stay. Appellant Bolt opposed Ptarmigan's motion for relief. Without statutorily required notice or hearing, the bankruptcy court granted Ptarmigan's

motion for relief. Ptarmigan's court lifted the temporary stay. This order from relief is statutorily defective. The bankruptcy court may only lift a stay upon request of a party in interest following notice and hearing. 11 U.S.C. § 362 (d), Supp. III 1985; Cathey v. Johns-Manville Sales Corp., 711 F.2d 60, 62 (6th Cir. 1983), cert. denied ___ U.S. ___, 106 S.Ct. 3335, 92 L.E. 2d 740 (1986), and _____. Ptarmigan's relief order fails on two fronts. First, Ptarmigan is not a party in interest. Ptarmigan claimed relief as a creditor and from stay to prosecute this instant appeal. Ptarmigan quest as an alleged creditor comes from the void judgments entered by the lower court which had no jurisdiction to do so. The CRI trustee's failure to attempt to pull the mining leases into the CRI estate within the statutorily required 60 day period gave the CRI estate no right, title, or interest to the mining leases. The pull back order was entered at the trustee's own peril subjecting him to personal liability. Ptarmigan had no right of action or standing to pursue the lower court action now being mootly argued in this court.

Second, Ptarmigan's alleged relief from stay is void and without effect. No relief from stay can be effectively entered without notice and hearing. The bankruptcy court made clear error by (1) entering a statutorily defective pull back order for the mining leases, (2) ordering the leases to be sold to Ptarmigan when the estate had no statutory right, title, or interest in the mining leases, and (3) entering a statutorily defective order for relief to Ptarmigan to allow continuation of these appellate proceedings.

These appellate proceedings must be stayed until the remand jurisdictional issues are reviewed, and further until

Ptarmigan receives effective and statutorily valid relief from stay — if applicable after the remand jurisdictional hearings are completed. Absent effective relief from stay, jurisdictional action and proceedings against the debtor are void ab initio. Kalb v. Feuenstein, 308 U.S. 433, 438-40, 60 S.Ct. 343, 346, 84 L.Ed. 370 ("The action of the court was not merely erroneous but was beyond its power, void, and subject to collateral attack." See also In re Ward, 837 F.2d 124, 126 (3rd Cir. 1988). (Sheriff's sale conducted in violation of the stay is "void" and without effect, citing Kalb.) See also Cathey v. Johns-Mansville Sales, 711 F.2d 60, 61 (6th Cir. 1983) "The automatic stay of proceedings is applicable at both the trial and appellate levels." cert. denied 478 U.S. 1021, 106 S.Ct. 3335, 92 L.Ed.2d 740 (1986).

These appellate proceedings must be stayed, an order of remand must be made to review the issue of jurisdiction, and the declaratory judgment issues in the pending complaint over force majeure and the validity of the mining leases as originally entered into between appellee Ptarmigan and appellants is finally determined. Oral argument now scheduled must be suspended to permit comity and justice in these issues. To continue these proceedings at this time would cause severe prejudice to appellants and result in extreme additional appellate costs and extended motions for certiorari

Dated this 30th day of September, 1994.

/s/ Wayne Bolt
Wayne Bolt

/s/ Nabesna Mining Partners
Nabesna Mining Partners
/s/ By Wayne Bolt, M.Gen. Ptr.
By: Wayne Bolt,
Managing General Partner

/s/ White Mountain Mng. Ptr.
White Mountain Mining Partners
/s/ By Wayne Bolt, Gen. Ptr.
By: Wayne Bolt, General Partner